

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHEN McCOLLUM, STEPHANIE
KINGREY, and SANDRA McCOLLUM,
individually and as heirs at law to the Estate
of LARRY GENE McCOLLUM,
PLAINTIFFS

v.

BRAD LIVINGSTON, JEFF PRINGLE,
RICHARD CLARK, KAREN TATE,
SANDREA SANDERS, ROBERT EASON,
the UNIVERSITY OF TEXAS MEDICAL
BRANCH and the TEXAS DEPARTMENT
OF CRIMINAL JUSTICE.

DEFENDANTS

CIVIL ACTION NO.
3:12-cv-02037

**PLAINTIFFS' MOTION FOR PROTECTIVE ORDER AND
MOTION TO QUASH UNAUTHORIZED DEPOSITIONS**

Defendant UTMB recently served deposition notices on Plaintiffs Stephen McCollum and Stephanie Kingrey, children of the deceased. Both Mr. McCollum and Ms. Kingrey have been deposed before, but UTMB never sought the Court's leave to depose them a second time. Plaintiffs respectfully ask the Court to grant a protective order terminating these depositions, and to quash the attached *subpoenas duces tecum*.

FACTS

Stephen McCollum and Stephanie Kingrey are the adult children of the decedent Larry McCollum, who died from extreme heat in the Hutchins State Jail. They were both deposed on November 22, 2013: Stephen for 1 hour, 47 minutes¹ and Stephanie for 1 hours and 57 minutes.² Defendant UTMB's counsel was among three defense attorneys who examined Mr. McCollum and Ms. Kingrey.

¹ See Exhibit 1, Deposition of Stephen McCollum.

² See Exhibit 2, Deposition of Stephanie Kingrey.

On January 22, 2014, Defendant UTMB sent new Notices of Deposition to Mr. McCollum and Ms. Kingrey, ordering them to appear for depositions on February 10,³ at 1:00 pm and 3:00 pm, respectively.⁴ *Subpoenas Duces Tecum* were attached, demanding the Plaintiffs' produce:

1. Birth certificates
2. Diaries
3. Medical records
4. Grievances, letters, and other communications
5. Photographs, videotapes and audiotapes that "accurately reflect [Larry McCollum's] life or personality."
6. Correspondence
7. Releases to the Social Security Administration for disability earnings
8. Releases to the Social Security Administration for social security records.

Defendant UTMB did not first seek the Court's leave to perform these additional depositions.

ARGUMENT

DEFENDANT DID NOT SEEK LEAVE FROM THE COURT

"A party *must* obtain leave of court" to depose a person who has already been deposed once in that case. Fed. R. Civ. Proc. 30(a)(2)(ii) (emphasis added). A party may only depose a person more than once if the Court finds:

- it would be not be unreasonably cumulative or duplicative;
- the information sought cannot be obtained from other, more convenient sources;
- the party requesting the deposition did not have ample opportunity to obtain the information already; and
- the burden and expense do not outweigh the likely benefit.

³ Even leaving aside the propriety of the proposed depositions, Plaintiffs' counsel is unavailable on this date UTMB selected. Lead counsel will be travelling to San Francisco for a dispositive motion hearing on February 11, 2014 in the class action *Opperman v. Path, Inc.*, 13-cv-00453-JST (N.D. Cal.). Plaintiffs' co-counsel is set for a hearing in *Tidwell v. City of Round Rock*, 1:13-cv-00965-LY (W.D. Tex.) on February 10, 2014.

⁴ Exhibit 3, Notice of Deposition of Stephen McCollum; Exhibit 4, Notice of Deposition of Stephanie Kingrey.

Fed. R. Civ. Proc. 26(b)(2). *Kleppinger v. Texas Dept. of Transp.*, 283 F.R.D. 330, 332 (S.D.Tex. 2012); *see also Byers v. Navarro County*, 2011 WL 4367773 *1 (N.D.Tex. 2011). Moreover, to take a second deposition, the movant must also typically show the witness was “inhibited from providing full information at the first deposition” or new information has come to light since the deposition for the first time in the litigation. *Kleppinger*, 283 F.R.D. at 333.

It is significant that the party seeking the Court’s leave has burden to make this showing. The burden was placed on movants by the 1993 Amendments to the Rules. *Id.* at 332. Prior to the 1993, it was the respondent’s duty to show “good cause” to prevent a second deposition. *Id.* at 332 n.2. The choice to saddle a party with the burden, in any given context, is a policy decision. *See Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973); *see also Texas Dept. of Community Affairs v. Burdine*, 450 US 248, 253 (1981). The Advisory Committee has decided it is more reasonable for the party seeking extra depositions to bear the burden of nonpersuasion.

DEFENDANT IS UNLIKELY TO SATISFY ITS BURDEN

Even if Defendant UTMB had properly sought leave to take additional depositions of Mr. McCollum and Ms. Kingrey, it is unlikely it could have satisfied its burden under 26(b)(2). Defendant voluntarily limited itself to just a few dozen minutes of examination in the first depositions. If it wished to learn more, it voluntarily relinquished its opportunity. The Rules do not permit Defendant to cavalierly pursue burdensome, duplicative deposition testimony at a whim.

CONCLUSION

For these reasons, the Court should issue a protective order, terminating the noticed depositions.

Dated: February 3, 2014

Respectfully submitted,

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By /s/ Jeff Edwards

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CERTIFICATE OF SERVICE

By my signature above, I certify that a true and correct copy of the foregoing has been served on all counsel of record through the Electronic Case Files System of the Northern District of Texas.

CERTIFICATE OF CONFERENCE

By my signature above, I certify that I conferred with counsel for UTMB in a good faith effort to resolve this dispute without the court's intervention. UTMB's counsel could not produce any authority showing a second deposition was proper in these circumstances, necessitating the motion for protective order.